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13
14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

16 MEGAN SCHMITT, DEANA
17 REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
18 individually and on behalf of
themselves and all others similarly
19 situated,

20 Plaintiffs,

21 v.

22 YOUNIQUE, LLC

23 Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**DEFENDANT YOUNIQUE, LLC'S
REPLY MEMORANDUM IN
SUPPORT OF MOTION *IN LIMINE*
NO. 2 TO EXCLUDE JEFF
MCFADDEN UNDER F.R.E. 702
AND DAUBERT**

Hearing Date: February 4, 2019
Hearing Time: 11:00 a.m.

The Hon. James V. Selna
Santa Ana, Courtroom 10C

SAC filed: January 4, 2018
Trial Date: Februarv 19. 2019

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27 **[PUBLIC REDACTED VERSION]**
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REPLY MEMORANDUM

I. INTRODUCTION

McFadden is not qualified to opine about the results of the chemical test conducted and analyzed by Impact Analytical. He earned a chemistry minor 34 years ago and apparently has not used this portion of his education since. He is not a chemist, [REDACTED], [REDACTED], he does not teach chemistry, [REDACTED], [REDACTED], which do not qualify him to give expert testimony in this case. McFadden strayed too far from the confines of his subject matter expertise (mechanical engineering) in rendering opinions here.

[REDACTED]. Instead, McFadden [REDACTED]. The Federal Rules of Evidence disallow this, as explained by Plaintiffs' own cited case. Plaintiffs ask the Court to ignore these and more shortcomings by stating the general proposition that inadmissible evidence can be relied upon if experts in a field would rely on it. Stated differently, Plaintiffs argue that an otherwise unqualified expert can delegate the fundamental work to formulate the expert opinion to an unknown expert, and then wholly adopt the results of that work as his own, under the hearsay exception. That is not the law of evidence. [REDACTED]'s findings are inadmissible hearsay, and Yonique would be prejudiced by the admission of the hearsay [REDACTED] findings and McFadden simply restating them.

It is Plaintiffs' burden to establish that McFadden is qualified and his opinions admissible. *In re Live Concert Antitrust Litigation*, 863 F.Supp.2d 966, 971 (C.D. Cal. 2012). Plaintiffs have not carried their burden and McFadden's opinions, testimony, and Report should be excluded.

II. JEFF MCFADDEN'S OPINIONS AND TESTIMONY SHOULD BE EXCLUDED UNDER FED. R. EVID. 702 AND DAUBERT

A. Jeff McFadden Is Not Qualified To Give His Expert Opinions

Plaintiffs' contention that McFadden's education and training is sufficient to qualify him as a chemistry expert does not withstand scrutiny. It has been 34 years since McFadden earned his *minor* in chemistry, and there is no evidence that he applied this education in the intervening decades. The record does not show that McFadden "[REDACTED]." (Opp., 3:5-10.) At deposition, McFadden admitted:

Q: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Dkt. 147-2, Ex. C, 90:3-4; 90:23-25.)

McFadden's follow-on testimony about his experience at Laird Technologies is [REDACTED]. When McFadden talks about Laird, [REDACTED]. (Gonnelli Decl., Ex. A, 91:10-92:3.) And, McFadden left Laird Technologies in 2004 (Dkt. 142-2, p. 13), so even if he gained some experience, it is 15 years stale.

Plaintiffs' argument that McFadden has chemical testing experience through his company, i3, is belied by his testimony. (Opp., 3:8-10.) McFadden confirmed that [REDACTED]. (Dkt. 147-2, Ex. C, 11:21-12:21 ([REDACTED]); 14:19-15:10 ([REDACTED]); 17:7-18:1 ([REDACTED]); 18:2-13 ([REDACTED]).)

McFadden's resume does not reflect or support Plaintiffs' contention that he

1 has “decades” of experience teaching “testing methods”. (*C.f.* Opp., 3:11-13, *with*
2 Dkt. 142-2, Ex. B (resume).) McFadden admitted [REDACTED]
3 [REDACTED]. (Dkt. 147-2, Ex. C, 21:22-23; Gonnelli Decl., Ex. A, 91:1-3.)

4 McFadden’s resume does not show that his experience as a mechanical
5 engineer and instructor “entails significant overlap with chemistry.” (Dkt. 142-2,
6 Ex. B.) Instead, his resume shows that he teaches courses about mechanical
7 engineering, such as “manufacturing processes” and “electro-mechanical design.”
8 (*Id.*, p. 12.) Other than his college minor, his resume does not establish any
9 connection with chemistry. (*Id.*, generally.)

10 Plaintiffs do not cite evidence, testimony, or case law to support their
11 contention that scientists generally might use an FT-IR. They do not attempt to
12 explain how a mechanical engineering background renders McFadden qualified to
13 opine on the results of a chemical test, which is the providence of chemists. It is
14 Plaintiffs’ burden to establish the admissibility of McFadden’s expert testimony, and
15 they have not carried it.

16 The cases cited by Plaintiffs are distinguishable because in each, the expert’s
17 subject matter expertise was closely tied to the topic on which he or she would be
18 rendering an opinion. In *D.F. v. Sikorsky Aircraft Corp.*, 2017 U.S. Dist. LEXIS
19 179651, *47 (S.D. Cal. Oct. 30, 2017), the court did not exclude the expert because
20 the expert had “actual experience with the subject of his inquiry.” In *United States*
21 *v. Garcia*, 7 F.3d 885, 889-90 (9th Cir. 1993), the expert also had actual experience
22 with the subject matter because the expert was a child mental health specialist who
23 had counseled approximately 40 sexually abused children and was permitted to
24 opine on whether the child-victim of aggravated sexual assault would be
25 traumatized by having to confront her abuser in court. In *Doe v. Rose*, 2016 U.S.
26 Dist. LEXIS 188650, *7-9 (C.D. Cal. Aug. 31, 2016), the expert was qualified to
27 testify on the effects of Rohypnol because he had master’s degrees in both
28 pharmaceutical science and forensic toxicology. Finally, *Audionics Sys. v. AAMP of*

1 *Fla., Inc.*, 2015 U.S. Dist. LEXIS 180218, *7-8 (C.D. Cal. July 10, 2015), involved
 2 two patents that enabled local vehicle stereo controls to interface with aftermarket
 3 devices. The court found that the expert was qualified to testify as such because,
 4 among other things, he had years of experience working with devices that permitted
 5 end users to interface between a vehicle and a computer, including writing code for
 6 a software program that permitted an application to interface with devices inside a
 7 vehicle, and providing technical assistance to consumers experiencing interfacing
 8 problems. *Id.*, *65-67. In each of Plaintiffs' cited cases, the expert's proponent
 9 demonstrated a close fit between the area of expertise and the area of expert
 10 testimony. This is lacking here.

11 In issuing the Report, McFadden did not stay within the confines of his
 12 subject area. *Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828, 839
 13 (9th Cir. 2011) (excluding expert; expert's expertise in biology, immunology,
 14 toxicology, and chemistry did not qualify him to give opinions on whether burning
 15 activities created toxicologically significant amounts of dioxins). McFadden has no
 16 subject matter expertise in chemistry and he is therefore not qualified to offer any
 17 opinion about the results of the FT-IR spectroscopy test – a chemical test interpreted
 18 by chemists – conducted by third-party [REDACTED]. See Fed. R. Evid. 702;
 19 accord, *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) (admissibility
 20 turns on whether “the expert has appropriate qualifications ... *on that subject*
 21 *matter.*” (emphasis added)).

22 **B. Jeff McFadden's Opinions Are Based Entirely On Hearsay And**
 23 **Not On Any Specialized Education Or Training**

24 The record is unambiguous: McFadden based his entire expert opinion on the
 25 [REDACTED]. McFadden testifies without qualification:

26 Q. [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 A. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 (Dkt. 147-2, Ex. C, 146:22-147:4). He reiterates this fact on multiple occasions.

5 (*Id.*, 42:4-10 [REDACTED]); 58:16-25 (“[REDACTED]

6 [REDACTED]”); 122:24-123:10 ([REDACTED]

7 [REDACTED]); 120:10-18 (same).)

8 The Report likewise confirms [REDACTED]

9 [REDACTED]

10 [REDACTED] (Dkt. 147-1,

11 Ex. A, p. 7.) [REDACTED]

12 [REDACTED]

13 McFadden did not [REDACTED] these results using specialized

14 knowledge or training, contrary to Plaintiffs’ arguments. (Opp., 5:19-20.) [REDACTED]

15 [REDACTED]

16 [REDACTED]. (Gonnelli Decl., Ex. A, 191:21-192:3.) [REDACTED]

17 [REDACTED]

18 [REDACTED]. (*Id.*, 37:1-38:24.) [REDACTED]

19 [REDACTED]. (*Id.*) [REDACTED]

20 [REDACTED]

21 [REDACTED]. (*Id.*)

22 McFadden did not use his expertise to select the FT-IR testing methodology.

23 He selected FT-IR after, “[REDACTED]

24 [REDACTED] (Dkt. 147-2, Ex. C, 92:13-24.) He conceded that he

25 selected FT-IR because it “[REDACTED]

26 [REDACTED]” (Gonnelli Decl., Ex. A, 92:25-93:5.)

27 McFadden did not use his expertise to select [REDACTED] to conduct the

28

1 FT-IR testing. He believes that he selected [REDACTED]

2 [REDACTED]
3 [REDACTED]. (*Id.*, 170:22-173:3.)

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] (*Id.*, 143:21-144:9.)

7 [REDACTED]
8 [REDACTED]. (*Id.*, 144:23-145:23.) [REDACTED]

9 [REDACTED]
10 [REDACTED]. (*Id.*, 103:14-105:2.) [REDACTED]

11 [REDACTED]. (*Id.*, 105:3-14.)

12 Plaintiffs do not deny that the [REDACTED] findings are hearsay; instead,
13 they argue that this is “data upon which an expert in his field would reasonably rely
14 in forming an opinion.” (Opp., 6:11-13.) However, *Plaintiffs do not offer any*
15 *evidence, testimony or case law* supporting or establishing that chemistry experts in
16 fact would rely on findings such as [REDACTED].¹ Having failed to make any
17 showing (which is their burden), under Plaintiff’s formulation of the legal rule, the
18 question of whether the probative value of the data outweighs its prejudice should
19 not even be reached. (Opp., 6:7-10.)

20 Even if chemistry experts would rely on findings such as [REDACTED],
21 the probative value of this hearsay evidence does not outweigh the prejudice.
22 Plaintiffs argue that “nothing prevented Defendant from seeking discovery from
23 [REDACTED] upon learning of its test results on August 1, 2018 when Defendant was
24

25 ¹ Plaintiffs’ chain of custody counter is nonsensical. The Lash Enhancer was
26 encased in an eyeglass case-type container. Brand new, the container was
27 shrink-wrapped in plastic. The Lash Enhancer unit that McFadden received
28 [REDACTED]. (Dkt. 147-2, Ex. C, 52:5-8; *c.f.* Dkt. 106-4, Images
4, 5.) The unit must have been opened before McFadden received it. [REDACTED]
[REDACTED]. (Dkt. 147-2, Ex. C, 46:11-47:21; 48:2-52:16.)

1 provided with McFadden’s report by email.” (Opp., 7:16-18.) Plaintiffs are wrong:
 2 Younique could not conduct discovery because fact discovery had closed two
 3 months prior, on June 1, 2018. If Plaintiffs are contending that [REDACTED]
 4 falls within the ambit of fact discovery, then Plaintiffs prejudiced Younique by
 5 failing to identify [REDACTED] in their initial disclosures served on January 10,
 6 2018. (Dkt. 142-2, Henry Decl., ¶ 3.) Plaintiffs also prejudiced Younique by failing
 7 to produce the lab results during fact discovery, instead objecting to Younique’s
 8 request that Plaintiffs’ produce, “All documents relating to any testing performed
 9 regarding the [Lash Enhancer].” (Meyer Decl., Ex. A, no. 34 (Plaintiffs objected
 10 that this information would be produced during expert discovery).) If Plaintiffs are
 11 instead contending that [REDACTED] falls within the scope of expert discovery,
 12 then Plaintiffs prejudiced Younique by failing to disclose [REDACTED] as an
 13 expert. (Dkt. 142-2, Henry Decl., ¶ 4.) At this stage in the proceedings, there is no
 14 witness who can lay a foundation for the [REDACTED] results. The inability to
 15 confront any witness is significant, and is exactly the reason why there is a rule
 16 against hearsay. Fed. R. Evid. Art. VIII (Hearsay), Adv. Comm. Introductory Note
 17 (“The Hearsay Problem”).

18 Plaintiffs’ cases are distinguishable on their facts. First, the language on
 19 which Plaintiffs rely in *Moreno v. Ross Island Sand & Gravel Co.*, 2015 U.S. Dist.
 20 LEXIS 127887, *19-20 (E.D. Cal. Sept. 23, 2015), is dicta because the party seeking
 21 to exclude the expert did not challenge the admissibility of the facts and data that the
 22 expert relied on.

23 Plaintiffs’ second cited case, *Jerpe v. Aerospatiale*, 2007 U.S. Dist. LEXIS
 24 37666, *16-17 (E.D. Cal. May 10, 2007), is also distinguishable on its facts. There,
 25 the court noted that, while Fed. R. Evid. 703 permits an expert to rely on
 26 inadmissible “facts or data” when experts in the field would reasonably rely on
 27 them, the court found, “[n]evertheless, experts may not solely rely on the opinions
 28 of other experts.” *Id.*, *16. At issue was whether the proffered expert, Dr. Kar, had

1 adopted an opinion derived by Mr. Wilson. The court noted that, “Dr. Kar’s
 2 deposition testimony was somewhat ambiguous on the issue of whether he was
 3 merely relying on the same underlying data set produced at the direction of
 4 Mr. Wilson, or if he was relying on both that data set and the conclusions that
 5 Mr. Wilson drew therefrom. Nevertheless, Dr. Kar’s declaration clearly states that
 6 he independently arrived at his opinions by, for example, reviewing x-ray
 7 radiographs and ultrasonic data.” *Id.*, *17. Here, however, on no less than 5
 8 occasions, [REDACTED]
 9 [REDACTED]. (See Dkt. 147-
 10 2, Ex. C, 146:22-147:4; 42:4-10; 58:16-25; 122:24-123:10; 120:10-18.) Under the
 11 teachings of *Jerpe*, McFadden’s opinions, testimony, and Report are not admissible.

12 Plaintiffs also cite *Jerpe* for the proposition that an expert may, at times, rely
 13 on another expert’s work. (Opp., 6:18-7:1.) The facts here are also distinguishable.
 14 In *Jerpe*, Dr. Kar knew Wilson’s reputation and his qualifications, knew the
 15 reputation of Wilson’s team, and the team’s experience and qualifications; and Dr.
 16 Kar was confident that Wilson’s team knew what it was doing. (*Id.*, citing *Jerpe*.)

17 McFadden, however, [REDACTED]
 18 [REDACTED]. (Dkt. 147-2, Ex. C, 131:14-132: 20;
 19 145:14-23.) [REDACTED]
 20 [REDACTED]
 21 [REDACTED].
 22 (*Id.*, 131:14-132:7.) [REDACTED]
 23 [REDACTED]. (*Id.*, 132:8-20.) [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]. (*Id.*, 145:14-23.) [REDACTED]
 27 [REDACTED]. (*Id.*, 108:6-9.)

28 McFadden did not apply any subject matter expertise here. [REDACTED]

1 [REDACTED]
2 [REDACTED]. This is impermissible, justifying
3 exclusion of McFadden.

4 **III. CONCLUSION**

5 For the further reasons stated herein, Jeff McFadden's testimony, opinions,
6 and Report should be excluded.

7
8 Dated: January 18, 2019

9 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

10
11 By

/s/ Abby Meyer

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